remedy by injunction: *Coffeen* v. *Brunton*, 4 McLean 519; *Dale* v. *Smithson*, 12 Abb. Pr. 238.

In the collection of the foregoing cases upon the law of trade-marks, we acknowledge our indebtedness to the able brief of S. S. Boyd, counsel in the case to which this note is appended.

A. M.

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## *Supreme Court of Pennsylvania.*

### HAMMETT *v.* THE CITY OF PHILADELPHIA.

It is settled in Pennsylvania that the legislature may confer upon municipal corporations the power to assess the cost of local improvements upon the property benefited.

But such local assessments can only be imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be imposed when the improvement is either expressed or appears to be for general public benefit.

The paving of a street, changing a road into a street, and bringing the land fronting on it into the market as building lots, is a local improvement, with special benefits to the land fronting on it, and the cost of such paving may be assessed on the property benefited.

But when a street is once opened and paved, and has thus become a part of the public highways of the city, the *repaving* of it, either with a new and different pavement, or by repairing the old one, is a part of the general duty of the corporation, and cannot be paid for by assessments on the adjoining properties.

WRIT of error to the District Court of the city of Philadelphia. The action was on a municipal claim filed in the following form.

The CITY OF PHILADELPHIA to the use of CHARLES E. JENKINS and JONATHAN TAYLOR,

*v.*

BARNABAS HAMMETT, owner or reputed owner.

*In the District Court of the City and County of Philadelphia, of March Term* 1868. NUMBER 31.

The City of Philadelphia, to the use of Charles E. Jenkins and Jonathan Taylor, files this claim against Barnabas Hammett, owner or reputed owner, of all that certain lot or piece of ground, with the buildings and improvements thereon erected, situate at the south-west corner of Broad and Poplar streets, for $1007\frac{26}{100}$ square yards of Nicolson pavement, done and laid in front of the premises above described, in Broad street, on the 27th day of November 1867, pursuant to the authority of "An Act supplementary to an Act to incorporate the City of Philadelphia, authorizing the improvement of Broad street in said City," approved March 23d 1866, and of "An Ordinance authorizing the paving of a portion of Broad street with Nicolson Pavement," approved July 5th 1867, at the rate of four dollars per

square yard, or the sum of $4029.04, and for five per cent. on said sum, or the sum of $201.45, as imposed by "A further Supplement to an Act consolidating the City of Philadelphia, *et cetera*, regulating the filing and collection of Municipal Claims," approved March 23d 1866; for which sum of $4230.49, with interest thereon, a lien is claimed against the above described premises, pursuant to divers statutes enacted and provided.

JAMES LYND, Solicitor of the City of Philadelphia.
DAVID W. SELLERS, Attorney for Jenkins and Taylor.

March 26th 1868.

The Act of March 23d 1866, Pamph. L. 299, in sect. 1 thus enacted:—

"That the city of Philadelphia be and it is hereby authorized and empowered and required to occupy Broad street, in the city of Philadelphia, for its entire length, as the same is now opened or may hereafter be opened, and from curb to curb thereof, except as hereinafter provided, for the uses and purposes of a public drive, carriageway, street, or avenue, and to improve the said street, or portions thereof, from time to time, and in whole or in part, with such mode of pavement, paving, macadamizing, gravelling, or other roadway, as may, in the judgment of the Select and Common Councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said Councils shall have, and are hereby authorized to enact such ordinances or resolutions, with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting upon said street."

Under the authority of this act the city of Philadelphia contracted with the licensees of the patentee of the Nicolson pavement to pave a portion of Broad street with that pavement, the cost thereof to be paid by the owners. The licensees were authorized to use the name of the city to recover the cost.

A *scire facias* was issued upon the above claim, and the owner of the ground filed an affidavit of defence as follows:—

"Barnabas Hammett, defendant above named, being duly sworn, deposes and says: That there is a defence to the plaintiff's claim, as follows:

"Broad street, at the part described in the claim, in front of the premises owned by this deponent, was, at the time of making the contract for paving the same by Jenkins & Taylor, and of doing the work thereunder for which the claim is filed, well paved with cobble stones in the style universally adopted for years past in this city for the best paved avenues, and such pavement was then in good order and condition, with every probability of it so continuing: it had been laid by the city and her authorized

agents, of their own option, at the time they saw fit, and in such mode and with such material as they chose to select, irrespective of any wish of the then owner of the premises, and the entire expenses thereof both of the materials for the pavement and the laying of the same, were paid by the then owner of the said real estate to the city and her agents at their request, and in obedience to the laws authorizing the pavement of the streets. Afterwards and while (as above stated) the pavement laid by the city at the expense of the owner of the premises was in good order, the city of Philadelphia entered into a contract with said Jenkins & Taylor, under which and not otherwise the plaintiffs did the work for the price of which the said claim is filed and this suit is brought.

"Deponent is advised that the said Act of Assembly is unconstitutional and therefore void, in this: that it delegates to the councils of the city power to impose upon certain persons owners of certain properties facing a public avenue, the entire burden of a general unrestricted work to be undertaken, in the words of the preamble, 'for the uses and purposes of the public and the benefits and advantages which will enure to them,' when those properties had already been subjected to the contribution for paving usual to all other city properties."

The District Court, upon rule, entered judgment for want of a sufficient affidavit of defence, and to that judgment this writ of error was taken.

*William A. Porter* and *Constant Guillou*, Esqs., for plaintiff in error, contended that no case in Pennsylvania had recognised any power in the legislature to *re*-pave at the expense of the ground which had already borne the expense of paving.

*William McMichael* and *David W. Sellers*, Esqs., for defendants in error, contended that acts imposing the cost of opening and paving highways, on owners of ground fronting thereon, are within the power of the legislature; and cited most of the cases quoted in the opinion of the court, and the dissenting opinion of READ, J.

They further contended that if there was no constitutional limit on the power, the whole subject-matter was one of public policy for the legislature, and not for the courts; and that if the

power was conceded, the reason for its exercise was not reviewable anywhere. That in a former case this court had declined to allow a similar averment that municipal work was wholly for public uses to defeat the charge against the individual: *City* v. *Tryon*, 11 Casey 401.

The opinion of the court was delivered by

SHARSWOOD, J.—It may be considered as a point fully settled and at rest in this state, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain. It was decided in *McMasters* v. *The Commonwealth*, 3 Watts 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and assessed upon others in the neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor WALWORTH in *Livingston* v. *New York*, 8 Wend. 85, that when any particular county, district, or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district, or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. This doctrine is again asserted in *Fenlon's Petition*, 7 Barr 173; and in the subsequent case of the *Extension of Hancock Street*, 6 Harris 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question.

On the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognised, and the liens for such assessments enforced: *Pennock* v. *Hoover*, 5 Rawle 291; *The Northern Liberties* v. *St. John's Church*, 1 Harris 104; *The City* v. *Wistar*, 11 Casey 427;

*The Commonwealth* v. *Woods*, 8 Wright 113; *Magee* v. *The Commonwealth*, 10 Id. 358; *Wray* v. *The Mayor, &c., of Pittsburgh*, Id. 265.

These cases all fall strictly within the rule as originally enunciated—local taxation for local purposes—or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the Constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister states. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, everything in which is "excepted out of the general powers of government, and shall for ever remain inviolate." There is no case to be found in this state, nor, as I believe, after a very thorough research, in any other—with limitations in the constitution or without them—in which it has been held that a legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can only be the consequence of attainder for crime, and not even then to its full extent, for there can be no forfeiture of estate to the Commonwealth except during the life of the offender. It is well remarked by Chief Justice ROBERTSON, of Kentucky, under a constitution without restraint on the legislative power of taxation: "An exact equalization of the burden of taxation is unattainable and Utopian. But, still, there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. * * * * * The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole Commonwealth. Such an exac-

tion, by whatever name the legislature might choose to call it, would not be a tax, but would, undoubtedly, be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without retribution of the value in money:" *Lexington* v. *McQuillan's Heirs*, 9 Dana 513. "A legislative act," says Chief Justice BEASLEY, of New Jersey, "authorizing the building of a public bridge, and directing the expenses to be assessed on A., B., and C., such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use:" *The Tidewater Co.* v. *Carter*, 3 C. E. Green 518. "The whole of a public burden," says Chief Justice BLACK, "cannot be thrown on a single individual under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order, or decree:" *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain, is taken not as the owner's share or contribution to a public burthen, but as so much beyond his share: *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419. It has been said by Judge FIELD, of California, now on the bench of the Supreme Court of the United States, that "money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it, in advance:" *Burnett* v. *Sacramento*, 12 California 76. I am not able, and do not feel disposed, to enter the lists upon such a ques-

tion, but it does seem to me that there may be occasions in which money may be taken by the state in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity; as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations, or individuals. The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the state at large in time of war: *The People ex rel. Griffin* v. *Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it, prevents its being restrained by any limitations as to either subject or occasion. In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation—a judicial sentence or rescript, or a taking of private property for public use without compensation—in any aspect, it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign breaks open the strong-box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is, *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheet-anchor of private property, the security of which against the government, as well as all others, is intended in the 1st section of the 9th article: "All men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness." The dollar which a poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness

or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation. It is none the less so if it be the act of the hydra-headed monster, a numerical majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our Constitution, to guard and protect this right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion. "There being," says Chief Justice MARSHALL, of Kentucky, "no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secures equality or uniformity in the distribution of public burthens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. * * * * This is the great conservative principle of the Constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a liberal construction for the attainment of so important and valuable an object:" *Cheany* v. *Houser*, 9 B. Monroe 341.

It may be said that *Sharpless* v. *The Mayor of Philadelphia*, 9 Harris 147, and *Kirby* v. *Shaw*, 7 Id. 258, are irreconcilable with the reasoning employed in this opinion. As to the first of these cases it is now practically unimportant, because it has been in effect reversed by the 7th section of the 1st amendment of the Constitution of 1857. It has been seen that it recognises that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied. As to *Kirby* v. *Shaw*, although a case on the very verge of the principle which is established—local taxation for local purposes—and there are some generalizations in the judgment as pronounced by Chief Justice GIBSON by far too broad, yet ultimately it is put on the ground of peculiar benefit. "The advantages of a county town," says he, "are too well appreciated not to make every village use all its exertions to have a court-house provided for its benefit and convenience. Without a court-house to replace the burnt one, Towanda could not have remained the

seat of justice; and as its inhabitants profited by, not only the disbursements of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribution. It was for the legislature to fix the proportion, and we have neither a right nor a disposition to question their justice." Here, too, the only real question would seem to be as to the application of the principle. *Kirby* v. *Shaw* has been since followed by this court in the case of the South Street Bridge, *The City of Philadelphia* v. *Field et al.* (July 2d 1868), a judgment in which the Chief Justice and myself were unable to concur.

Assessments on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional—thus far have the judicial decisions in this and other states gone, and no further. A few only of the leading cases need be cited. *In the Matter of Canal Street*, 11 Wend. 155; *Hill* v. *Higdon*, 5 Ohio (N. S.) 243; *Stryker* v. *Kelly*, 7 Hill 9, 23; s. c., 2 Denio 323; *Goddard, Petitioner*, 16 Pick. 504; *Lowell* v. *Headley*, 8 Metcalf 180; *Garrett* v. *City of St. Louis*, 55 Missouri 505; *Anderson* v. *Kern*, Draining, 14 Indiana 199; *Sanborn* v. *Rice County*, 9 Minn. 273; *Weeks* v. *City of Milwaukee*, 10 Wisc. 242; *Creighton* v. *Mancon*, 27 Cal. 613; *Tide Water Co.* v. *Coster*, 3 C. E. Green 54, 518. Undoubtedly, the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge PECK of Ohio: "It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike:" *Northern Indiana Railroad Co.* v. *Connelly*, 10 Ohio (N. S.) 159. Or, as in our own case of *Commonwealth* v. *Woods*, 8 Wright 113, where it was held, in an instance unquestionably within the general principle, that the assessment when made in pursuance of law is final and conclusive, and cannot again be reviewed by any other tribunal. On the examination of the cases I have found two in which it was

attempted, though fortunately without success, to make the owners personally liable for assessments beyond the value of their lots, cases which show how dangerous and liable to abuse is this power of special taxation with all the guards which can be thrown around it. *In the Matter of Canal Street*, 11 Wend. 155, the court say: "In this case it is assumed and not contradicted that many individuals will be ruined if compelled to pay the assessments for which they are liable." In *Creighton* v. *Manson*, 27 California 613, the lot in question, before the grading of the street, for which the assessment was claimed, was appraised for revenue purposes at $1400. It was rendered worthless by the grading; yet the attempt was made to make the owners personally liable for its assessment, which was $1989.54.

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is, therefore, a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching, and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble-stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in

the increased cost assessed upon him for the paving. Without any pretence that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in *The People ex rel. Post* v. *Brooklyn*, 6 Barb. 209: "If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the Common Council; and if their lands are to be so much enhanced in value, they will, by their contributions, enable the authorities to perform the work at a very trifling expense to the city at large." The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and for ordinary business and travel, but to make a great public drive—a pleasure-ground—along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23d 1866, Pamph. L. 299, for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be "for the uses and purposes of the public, and the benefits and advantages which will enure to them by making and for ever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city." Thus we have special taxation authorized for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an

improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary, and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public buildings on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, Thus far shalt thou go, and no further. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified, by the principles of the Constitution, in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them; and as the conclusion at which we have arrived that the Act of Assembly of March 23d 1866, so far as it authorizes the councils of the city of Philadelphia "to enact such ordinances or resolutions with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., dissented.[1]

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[1] We regret that its length prevents our printing the elaborate and able dissenting opinion of READ, J., containing a very full and learned review of the subject of legislative power over local assessments both in England and in Pennsylvania as a colony and as a state.